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BOOK REVIEWS.

THE LAW OF COMBINATIONS. By Arthur J. Eddy. Chicago: Callaghan & Co. 1901. 2 Vols., pp. 1,540.

This is an eminently sane and cloud-dispelling book. Its author is a Chicago lawyer in active and successful practice.

"Combination as an economic factor in the industrial and commercial world" presents a theme which no lawyer can neglect. In these volumes we have an adequate and satisfactory analysis of the several subjects collaterally or directly involved in the general topic, with a calm statement of conclusions arrived at by the application of legal principles, as well as an equally dispassionate consideration of results that have been reached by the failure to apply established legal rules and by substituting therefor the rant of politicians and the ignorance of agitators. Every English and American judicial decision that bears upon the points under consideration has been cited. All important decisions are stated and reviewed in the text, the precise language used being at the same time given in extensive footnotes. The statute law of every State is presented. The Federal Anti-Trust Act is thoroughly discussed. The labor and learning exhibited are phenomenal and the results are worthy.

The first subject historically dealt with is "Monopolies," and the course of events is made clear. Although large concerns are often termed monopolistic, and there seems to be no limit to the prejudice implied in the charge, nevertheless, at the present time, there are, in fact, no monopolies except such as have been established by laws which there is no disposition to repeal, such as patents, copyrights and certain quasi-public grants.

Under "Controlling the Market," Regrating, Forestalling and Engrossing are explained with precision, and the inability of repressive statutes to control commercial requirements is clearly developed.

The law applicable to "Corners" is next examined; and Stock Exchange transactions are treated in the light of the cases respecting "Combinations," "Futures" and so-called "Gambling Contracts." This chapter contains the authorities that govern brokerage transactions upon Boards of Trade.

In Part III the author reaches his principal subject, "Combinations and Conspiracies." Combinations are not inherently illegal. On the contrary, "the law recognizes the economic truth that the co-operation of individuals is essential to the well-being and the progress of society." The formation of partnerships and of corporations is provided for and encouraged by the law. The consolidation of partnerships and of corporations is permitted. The legality of a combination is not to be measured by its magnitude. So

far as the fact of combination is concerned, a partnership and a corporation are substantially the same thing.

The usual reason given for the existing preference for the corporate rather than the partnership form in industrial organizations is the limited liability of stockholders, but that is only one of several reasons and is often of little importance. Other reasons are found in the continuity of corporate existence, which does not dissolve upon a member's death; the flexibility and accuracy in handling individual interests; and the opening of the door to the membership of large numbers of individuals, all fully protected in every right, and each having an easy and prompt method of disposing of his holdings.

While Mr. Eddy recognizes the fact that judicial decisions cannot be reconciled, he concludes that a combination is not illegal at the common law unless its purpose is immoral, unlawful or oppressive. Statutory provisions, however, have very little relation to general principles.

In this connection he rehearses the various cases in which combinations of manufacturers and others have been held to be legal, although their object was the avoidance of excessive competition. This line of decisions, ending with the Mogul Steamship Company case,[1] is worthy of consideration by many who are apt to forget that such is the law, and that statutes have been enacted to overcome the common law rights thus established.

Illegal combinations are those which are either (*a*) conspiracies or (*b*) contrary to statute. This proposition opens a discussion of the law governing Conspiracies which is exceedingly adequate and complete. While combinations are condemned by the common law if conspiracy is proved, the application of this rule by the courts has not been consistent. A marked differentiation is found in respect to the treatment accorded to labor and to capital, which have never stood upon a plane of equality before the courts, though manifestly subject to the same legal principles. The law now is that combinations to raise wages are legal, while combinations to raise prices are not legal. The author does not overlook the curious fact that a feeling of sympathy is now apparent between the large labor organizations and the large industrial combinations. This feeling is logical and natural and is clearly explained.

"Combinations of Labor in England" is the subject of a very interesting chapter, followed by another on "Combinations of Labor in the United States." Such combinations are unlawful if they amount to conspiracies in which the methods or objects are unlawful or oppressive. Recent cases are fully stated which have restrained such conspiracies when they interfered with interstate commerce, the transportation of mails or the rights of others to labor. This subject is so fully treated that no additional library is necessary for the guidance of the practitioner. Especially interesting is the full examination given to the very recent case of Allen *v.* Flood,[2] in

[1] (1892), A. C. 25.
[2] (1898) A. C. 1.

which the House of Lords in England, overruling the common law judges in the lower courts, including those called in for special advice in this very case, decided that a workman could not recover damages against a walking delegate who had caused him to be deprived of employment. Labor unions, strikes, picketing and boycotts are all thoroughly sifted, and the conclusion derived from the authorities is that labor has the right to combine (1) to raise the price of labor, (2) to limit the quantity of labor, (3) to strike, if peaceful and orderly methods are employed, and (4) to establish and dictate terms and conditions of work if threats and coercion be not employed.

Attention is called to the deprecatory and half-apologetic tone frequently used by courts and always by legislatures in dealing with excesses and conspiracies on the part of labor, as contrasted with the stern attitude of indignant virtue assumed in considering errors of precisely the same character and illegality when committed by capital.

In dealing with "Combinations of Capital" it is shown that the true test of legality is the same as with labor, namely, whether or not the combination amounts to a conspiracy; but the rule usually applied by the courts is totally different, namely, whether or not the combination tends to create a monopoly or to restrain trade. A tendency is more a matter of opinion than of fact. We can determine whether a given combination does in fact stifle competition or produce a monoply, but to say that it tends so to do practically admits that in fact it does not. These decisions which arbitrarily dispose of valuable properties on account of alleged tendencies are correctly termed "pernicious."

Nevertheless, such is the modern trend of adjudged cases, the arguments of which are transferred to our author's pages. Consideration of the results thus accomplished naturally leads to an historical examination of the struggle that has occupied public attention during the last ten or fifteen years. Capital first organized what the author calls "Simple Combinations," formed by voluntary association among competitors for the advancement of their mutual interests. While no illegal element could be fairly perceived in these arrangements and their necessity was often obvious if independent ownership was to be preserved, nevertheless the courts did not hesitate to ride them down and legislatures acted even more summarily than the courts. It was enough to say of such a compact that it tended to increase prices or to prevent competition and was therefore opposed to public policy—a dangerous phrase because not susceptible of definition.

Thus placed under the ban of the law, capital sought for methods of accomplishing the same result which would not be held illegal, and next hit upon the "Trust." Under this plan each stockholder deposited his stock with trustees, who issued their own certificates against the stock surrendered and handled the constituent corporations in the common interest of all. This method was found objectionable in practice for various reasons arising under the

laws governing corporations, and was also denounced by the courts. It was therefore abandoned and is now obsolete. The author cites an interesting paper by the late Theodore W. Dwight, in which these significant words were employed: "Let us therefore be calm. Trusts as a rule are not dangerous; they cannot overcome the law of demand and supply, nor the resistless power of unlimited competition. The right of association is the child of freedom of trade. If association is prevented by law, different manufactories may be melted into one."

And precisely this result ensued. Corporate combinations were evolved in which the titles of individual firms and corporations were "melted into one," and thus instead of a mere tendency to restrict competition, a total extinguishment was accomplished so far as the combining parties were concerned; while, at the same time, all laws were obeyed and each party kept within his right of contract derived from a source even higher than the Constitution itself. This was the logical outcome of the decisions against simple corporations and trusts. "The right of individuals to form corporations and to sell to corporations their various plants and properties is too widely recognized to be questioned at this day." Legislatures are still casting about for methods to curb the operations of corporate combinations. Some States they are forbidden to enter. Other States refuse to enforce contract obligations in their favor. Generally speaking they are a success. Without special legislation the courts have not succeeded in finding any theory for their suppression. As Mr. Eddy well says:

> "Combination is a condition of economic progress. Courts and legislatures may check and embarrass it, but neither courts nor legislatures can prevent what is essential to the progress of the community. Law is effectual only in so far as it is in harmony with the natural tendency and condition of things; it is ineffectual in so far as it runs counter to the laws of economics and evolution.
>
> "There is nothing inherently evil in a combination, the object of which is to raise wages or prices or restrict competition or control production, each of these several objects being recognized by all men as not only lawful but, economically speaking, laudable in the ordinary pursuits and occupations of life.
>
> "If, as seems unquestionably true, the economic conditions and tendencies of the day demand co-operation and combination on a large scale, all opposing statutes and all opposing decrees and judgments will prove futile for good and prolific of mischief."

It will be difficult to find elsewhere a better historical analysis of the law respecting Contracts in Restraint of Trade than is given in the second volume of Mr. Eddy's work. As usual he begins at the very beginning and traces the development of the law step by step. In this case also the definitions and principles of the common law have been wrested from their moorings to the deception of many. Contracts in restraint of trade were necessary in order to enable citizens to sell and convey the good-will attached to successful business enterprises. This is a valuable though intangible asset which the owner has a right to dispose of for the highest price attainable. He cannot do this unless at the same time he can assure the purchaser that he will not himself embark in the same business

within the territory covered by the sale. This contract "in restraint of trade" at first was not supported by the courts. Afterwards the rule was greatly changed in accordance with the requirements of commercial necessity, and such contracts are now sustained if not broader than the principal transaction demands.

But the phrase "Contract in Restraint of Trade" sounds well in the mouth of the orator and was understood to mean something inherently bad. It was, therefore, employed in statutes as a denunciatory phrase, and has been used by legislatures and judges who ought to know better as meaning a contract in restraint of competition. A hopeless confusion has thus arisen. There is no logical connection between contracts in restraint of trade as defined in the cases and combinations in restraint of competition.

This confusion was worse confounded in 1890 by the appearance in the Federal Statutes of what is known as the Anti-Trust Law, which in its first sentence declares illegal "every contract * * * in restraint of trade or commerce among the several States or with foreign nations." This statute derives its constitutional warrant solely from the interstate commerce section of the Constitution of the United States. The struggles of the Supreme Court to so interpret it that it would mean something and yet would not do too much harm, are narrated by the author with accuracy and detail. The result of these cases, in which the Court has uniformly divided four to five, has been among other things the ruling that the act, being universal in its terms, must necessarily apply to all contracts in restraint of competition, even though valuable in themselves; while contracts in restraint of trade, as previously construed, appear to be still lawful and commendable.

The book has been carefully prepared, and is handsomely printed. The frequent insertion of dates is especially commendable. Messrs. Callaghan & Company are to be congratulated upon the production of a work which will for many years be authoritative, and which no lawyer whose business leads him into the domain of corporate rights and liabilities can afford to do without.

A TREATISE ON THE LAW OF SURETYSHIP AND GUARANTY. By Darius H. Pingrey, LL.D. Albany, N. Y.: Matthew Bender. 1901. p. xvi., 443.

Possibly this is the sort of literary production which the afflicted patriarch had in mind, when he uttered his famous exclamation, "Oh! * * * that mine adversary had written a book." Certainly, it is one that delivers the author, bound hand and foot, into the power of a hostile critic. It is fit to sour the milk of human kindness in the sweetest breast, and to transform the gentlest critic into a savage "Scotch Reviewer." The author is not our adversary, and we entered upon the examination of his work in the friendliest mood; but, as we plodded from page to page, in the dogged attempt to get at his meaning, and to keep awake, it required a patience greater even than Job's to retain our habitual serenity of temper, and refrain from becoming *his* ad-